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No. 90-303

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

LE BUP THI DAO, et al.,
Petitioners,

VS.

BOARD OF MEDICAL QUALITY ASSURANCE
OF THE STATE OF CALIFORNIA, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District

APPENDICES TO BRIEF FOR THE BOARD OF MEDICAL QUALITY ASSURANCE, et al. IN OPPOSITION

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STATUTORY APPENDIX

I. The following are the full texts of the provisions of the California Business and Professions Code cited in this brief.

§ 2005. Division of licensing; responsibilities

The Division of Licensing shall have the responsibility for the following:

(a) Approving undergraduate and graduate medical education programs.

(b) Approving clinical clerkship and special programs and hospitals for such programs.

(c) Developing and administering the physician's and surgeon's licensure examination.

(d) Issuing licenses and certificates under the board's jurisdiction.

(e) Administering the board's continuing medical education program.

(f) Administering the student loan program.

(Added by Stats.1980, c. 1313, p. 4445, § 2.)

§ 2080. Application of article

(a) Except as otherwise provided, the provisions of this article applicable to applications generally shall apply to all certificates issued.

(b) Every applicant for a physician's and surgeon's certificate shall comply with the requirements of this article unless other specific requirements of this chapter are applicable to a particular class of applicant.

(Added by Stats.1980, c. 1313, p. 4454, § 2.)

§ 2081. Application blanks; verification

Each application shall be made upon a form provided by the Division of Licensing, and each application form shall contain a legal verification to be signed by the applicant verifying under penalty of perjury that the information provided by the applicant is true and correct and that any information in supporting documents provided by the applicant is true and correct.

(Added by Stats.1980, c. 1313, p. 4454, § 2. Amended by Stats.1986, c. 220, § 8, eff. June 30, 1986.)

§ 2082. Contents and attached documents

Each application shall include the following:

(a) A diploma issued by an approved medical school. The requirements of the school shall have been at the time of granting the diploma in no degree less than those required under this chapter or by any preceding medical practice act at the time that the diploma was granted. In lieu of a diploma, the applicant may submit evidence satisfactory to the Division of Licensing of having possessed the same.

(b) An official transcript or other official evidence satisfactory to the division showing each approved medical school in which a resident course of professional instruction was pursued covering the minimum requirements for certification as a physician and surgeon, and that a diploma and degree were granted by the school.

(c) Such other information concerning the professional instruction and preliminary education of the applicant as the division may require.

(d) An affidavit showing to the satisfaction of the division that the applicant is the person named in each diploma and transcript that he or she submits, that he or she is the lawful holder thereof, and that such diploma or transcript was procured in the regular course of professional instruction and examination without fraud or misrepresentation.

(Added by Stats.1980, c. 1313, p. 4454, § 2.)

§ 2083. Tender of fee; filing

Each application for a certificate shall be accompanied by the fee required by this chapter and shall be filed with the Division of Licensing.

(Added by Stats.1980, c. 1313, p. 4455, § 2. Amended by Stats.1987, c. 1368, § 1.)

§ 2084. Approval of schools

The Division of Licensing may approve every school which substantially complies with the requirements of this chapter for resident courses of professional instruction. Graduates of medical schools approved under this section shall be deemed to meet the requirements of Section 2089. Medical schools accredited by a national accrediting agency approved by the division and recognized by the United States Department of Education shall be deemed approved by the division under this section. Nothing in this chapter prohibits the division from considering the quality of the resident courses of professional instruction required for certification as a physician and surgeon.

(Added by Stats.1980, c. 1313, p. 4455, § 2. Amended by Stats.1985, c. 1176, § 2; Stats.1985, c. 1178, § 1.)

§ 2085. Graduates from special medical school programs of approved medical schools; failure to meet specified curriculum requirements; provisions for applicant approval; presumption

(a) Notwithstanding Section 2084, a graduate of an approved medical school located in the United States or Canada who has graduated from a special medical school program which does not substantially meet the requirements of Section 2089 with respect to any aspect of curriculum length or content may be approved by the division if the division determines that the applicant has otherwise received adequate instruction in the subjects listed in subdivision (b) of Section 2089. The division may require an applicant under this section to undertake additional education to bring up to standard, instruction in the subjects listed in subdivision (b) of Section 2089 as a condition of issuing a physician's and surgeon's certificate. In approving an applicant under this section, the division may take into account the applicant's total relevant academic experience, including performance on standardized national examinations.

(b)(1) Notwithstanding subdivision (a) or Sections 2084 and 2089, an applicant who is a graduate of an approved medical school located in the United States or Canada who has graduated from a special medical school program that does not substantially meet the requirements of Section 2089 with respect to any aspect of curriculum length or content shall be presumed to meet the requirements of Sections 2084 and 2089 if the special medical school program has been reviewed and approved by a national accrediting agency approved by the division and recognized by the United States Department of Education.

(2) This presumption may be overcome upon a finding by the division that the medical education received by the applicant is not the educational equivalent of the medical education received by graduates of medical schools approved pursuant to subdivision (a) or Section 2084. In making its finding, the division shall consider, at a minimum, the applicant's total academic and medical training experience prior to, and following, as well as during, medical school, the applicant's performance on standardized national examinations, including the National Board Examinations, the applicant's achievements as a house staff officer, and the number of years of postgraduate medical training completed by the applicant.

(3) An applicant under this subdivision who (A) has satisfactorily completed at least two years of postgraduate clinical training approved by the Accreditation Council for Graduate Medical Education or the Coordinating Council of Medical Education of the Canadian Medical Association and whose postgraduate training has included at least one year of clinical contact with patients and (B) has achieved a passing score in each subject area of the

written examination required for licensure, satisfies the requirements of Sections 2084 and 2089. For purposes of this subdivision, a passing score on a subject area in Part I of the written examination shall be a standard score of 380 or higher, and for a subject area in Part II of the examination, a standard score of 290 or higher. For purposes of this subdivision, an applicant who has satisfactorily completed at least two years of approved postgraduate clinical training on or before July 1, 1987, shall not be required to have at least one year of clinical contact with patients.

(4) An applicant who has not achieved a passing score in one or more subject areas of the written examination required for licensure may otherwise demonstrate to the satisfaction of the division that he or she possesses adequate skills, knowledge, and ability in the particular subject area or areas of the examination not passed.

(5) An applicant who has not achieved a passing score in one or more subject areas of the required examination may, at the discretion of the division, be allowed to remedy that deficiency by achieving a passing score in the pertinent subject area or areas through a reexamination administered under the auspices of the division, at the applicant's expense.

(6) Applicants under this subdivision who apply after satisfactorily completing one year of approved postgraduate training shall have their applications reviewed by the division and shall be informed by the division either that satisfactory completion of a second year of approved postgraduate training will result in their being deemed to meet the requirements of Sections 2084 and 2089, or informed of any deficiencies in their qualifications or documentation and the specific remediation, if any, required by the division to meet the requirements of Sections 2084 and 2089. Upon satisfactory completion of the specified remediation, the division shall promptly issue a license to the applicant.

(Added by Stats.1985, c. 1169, § 1; Stats.1985, c. 1176, § 3. Amended by Stats.1986, c. 1237, § 1, eff. Sept. 26, 1986; Stats.1987, c. 30, § 1, eff. May 28, 1987.)

§ 2086. Evaluation of curricula of medical schools; medical consultants and investigators

The Division of Licensing may utilize medical consultants and investigators employed by the board pursuant to Section 2020 to evaluate the curricula of medical schools. A medical consultant or investigator shall meet such reasonable standards of experience and education, to be determined by the division, as will enable him or her to competently perform such duties of evaluation.

(Added by Stats.1980, c. 1313, p. 4455, § 2.)

§ 2087. Court action in event of disapproval or rejection of applicant

If any medical school is not approved by the Division of Licensing or any applicant for examination is rejected by it, then the school or the applicant may commence an action in the superior court as provided in Section 2019 against the division to compel it to approve the school or to admit the applicant to examination or for any other appropriate relief. If the applicant is denied admittance to the examination or a certificate on the grounds of unprofessional conduct, the provisions of Article 12 (commencing with Section 2220) shall apply. In such an action the court shall proceed under Section 1094.5 of the Code of Civil Procedure, except that the court may not exercise an independent judgment on the evidence. The action shall be speedily determined by the court and shall take precedence over all matters pending therein except criminal cases, applications for injunction, or other matters to which special precedence may be given by law.

(Added by Stats.1980, c. 1313, p. 4455, § 2.)

§ 2088. Premedical educational requirements

Each applicant shall present an official transcript or other official evidence to the Division of Licensing that he or she has completed two years of preprofessional postsecondary education, or its equivalent, before completing the resident course of professional instruction.

The two-year preprofessional postsecondary education shall include the subjects of physics, chemistry, and biology. In the event that one of the above subjects was not completed as a part of that postsecondary education, an applicant shall complete a course of instruction in such subjects in an accredited postsecondary educational institution prior to taking the written examination for licensure.

(Added by Stats.1980, c. 1313, p. 4456, § 2.)

§ 2089. Medical training requirements

(a) Each applicant for a physician's and surgeon's certificate shall show by official transcript or other official evidence satisfactory to the Division of Licensing that he or she has successfully completed a medical curriculum extending over a period of at least four academic years, or 32 months of actual instruction, in a medical school or schools located in the United States or Canada approved by the division, or in a medical school or schools located outside the United States or Canada which otherwise meets the requirements of this section. The total number of hours of all courses shall consist of a

minimum of 4,000 hours. At least 80 percent of actual attendance shall be required. If an applicant has matriculated in more than one medical school, the applicant must have matriculated in the medical school awarding the degree of doctor of medicine or its equivalent for at least the last full academic year of medical education received prior to the granting of the degree.

(b) The curriculum for all applicants shall provide for adequate instruction in the following subjects:

Alcoholism and other chemical substance dependency, detection and treatment.

Anatomy, including embryology, histology, and neuroanatomy.

Anesthesia.

Biochemistry.

Child abuse detection and treatment.

Dermatology.

Geriatric medicine.

Human sexuality.

Medicine, including pediatrics.

Neurology.

Obstetrics and gynecology.

Ophthalmology.

Otolaryngology.

Pathology, bacteriology, and immunology.

Pharmacology.

Physical medicine.

Physiology.

Preventive medicine, including nutrition.

Psychiatry.

Radiology, including radiation safety.

Surgery, including orthopedic surgery.

Therapeutics.

Tropical medicine.

Urology.

(Added by Stats.1980, c. 1313, p. 4456, § 2. Amended by Stats.1984, c. 1149, § 2; Stats.1985, c. 1176, § 4.)

§ 2089.5. Clinical instruction; adequacy

(a) Clinical instruction in the subjects listed in subdivision (b) of Section 2089 shall meet the requirements of this section and shall be considered adequate if the requirements of subdivision (a) of Section 2089 and the requirements of this section are satisfied.

(b) Instruction in the clinical courses shall total a minimum of 72 weeks in length.

(c) Instruction in the core clinical courses of surgery, medicine, pediatrics, obstetrics and gynecology, and psychiatry shall total a minimum of 36 weeks in length with a minimum of eight weeks instruction in surgery, eight weeks in medicine, six weeks in pediatrics, six weeks in obstetrics and gynecology, and four weeks in psychiatry.

(d) Of the instruction required by subdivision (b), including all of the instruction required by subdivision (c), 54 weeks shall be performed in a hospital that sponsors the instruction and shall meet one of the following:

(1) Is a formal part of the medical school.

(2) Has an approved residency program in family practice or in the clinical area of the instruction for which credit is being sought.

(3) Is formally affiliated with an approved medical school located in the United States or Canada.

(4) Is formally affiliated with a medical school located outside the United States or Canada.

(e) If the institution, specified in subdivision (d), is formally affiliated with a medical school located outside the United States or Canada, it shall meet the following:

(1) The formal affiliation shall be documented by a written contract detailing the relationship between the medical school and hospital and the responsibilities of each.

(2) The school and hospital shall provide to the division a description of the clinical program. The description shall be in sufficient detail to enable the division to determine whether or not the program provides students an adequate medical education. The division shall approve the program if it determines that the program provides an adequate medical education. If the division does not approve the program, it shall provide its reasons for disapproval to the school and hospital in writing specifying its findings about each aspect of the program that it considers to be deficient and the changes required to obtain approval.

(3) The hospital, if located in the United States, shall be accredited by the Joint Commission on Accreditation of Hospitals, and if located in another country, shall be accredited in accordance with the law of that country.

(4) The clinical instruction shall be supervised by a full-time director of medical education, and the head of the department for each core clinical course shall hold a full-time faculty appointment of the medical school and shall be board certified or eligible, or have an equivalent credential in that specialty area appropriate to the country in which the hospital is located.

(5) The clinical instruction shall be conducted pursuant to a written program of instruction provided by the school.

(6) The school shall supervise the implementation of the program on a regular basis, documenting the level and extent of its supervision.

(7) The hospital-based faculty shall evaluate each student on a regular basis and shall document the completion of each aspect of the program for each student.

(8) The hospital shall ensure a minimum daily census adequate to meet the instructional needs of the number of students enrolled in each course area of clinical instruction, but not less than 15 patients in each course area of clinical instruction.

(9) The division, in reviewing the application of a foreign medical graduate, may require the applicant to submit a description of the clinical program, if the division has not previously approved the program, and may require the applicant to submit documentation to demonstrate that the applicant's clinical training met the requirements of this subdivision.

(10) The medical school shall bear the reasonable cost of any site inspection by the division or its agents necessary to determine whether the clinical program offered is in compliance with this subdivision.

(Added by Stats.1985, c. 1176, § 4.5; Stats.1985, c. 1178, § 2. Amended by Stats.1989, c. 506, § 1.)

§ 2122. Faculty-in-exile committee; university of Saigon, Vietnam, medical school admittees; licensure; duration of section

(a) The board shall appoint a six-member Faculty-in-Exile Committee, consisting of five former faculty members of the University of Saigon, Vietnam, Medical School, and one member of the Division of Licensing. The board shall appoint the members of the committee no later than February 1, 1988.

(b) The committee shall review the application files of applicants who were admitted to the University of Saigon, Vietnam, Medical School before 1975, and who completed their education during the years 1975 to 1980, inclusive, to evaluate their eligibility and make recommendations for licensure as a physician and surgeon. The committee shall consider those applications on a timely basis, not to exceed 60 days.

(c) The committee shall make recommendations to the Division of Licensing and the division shall consider each recommendation and make a finding within 90 days after receipt of that recommendation. The division shall accept the recommendation of the committee, unless the division finds, after notice and opportunity for hearing, that the committee's recommendation is not based upon substantial evidence.

This section shall be operative until January 1, 1992, and on that date is repealed, unless a later enacted statute, which becomes effective on or before January 1, 1992, deletes or extends that date.

(Added by Stats.1987, c. 1382, § 2.)

II. The following are the full texts of the provisions of the Code of Civil Procedure cited in this brief.

§ 437c. Grounds for and effect of summary judgment; procedure on motion

(a) Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense thereto. The motion may be made at any time after 60 days have elapsed since the general appearance in the action or proceeding of each party against whom the motion is directed or at such earlier time after the general appearance as the court, with or without notice and upon good cause shown, may direct. Notice of the motion and supporting papers shall be served on all other parties to the action at least 28 days before the time appointed for hearing. However, if the notice is served by mail, the required 28-day period of notice shall be increased by five days if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States. The motion shall be heard no later than 30 days before the date of trial, unless the court for good cause orders otherwise. The filing of the motion shall not extend the time within which a party must otherwise file a responsive pleading.

(b) The motion shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions and matters of which judicial notice shall or may be taken. The supporting papers shall include a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed. Each of the material facts stated shall be followed by a reference to the supporting evidence. The failure to comply with this requirement of a separate statement may in the court's discretion constitute a sufficient ground for denial of the motion.

Any opposition to the motion shall be served and filed not less than 14 days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise. The opposition, where appropriate, shall consist of affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial

notice shall or may be taken. The opposition papers shall include a separate statement which responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts which the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion.

Any reply to the opposition shall be served and filed by the moving party not less than five days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise.

Evidentiary objections not made either in writing or orally at the hearing shall be deemed waived.

The provisions of Section 1005 and the provisions of subdivision (a) of Section 1013, extending the time within which a right may be exercised or an act may be done, do not apply to this section.

(c) The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.

(d) Supporting and opposing affidavits or declarations shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

(e) If a party is otherwise entitled to a summary judgment pursuant to the provisions of this section, summary judgment shall not be denied on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment, except that summary judgment may be denied in the discretion of the court, where the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to that fact; or where a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof.

(f) A party may move for summary adjudication of issues, either by itself or as an alternative to summary judgment. If it appears that the proof supports the granting of the motion for summary adjudication as to some but not all the issues involved in the action, or that one or more of the issues raised by a claim is admitted, or that one or more of the issues raised by a defense is conceded, the court shall, by order, specify that those issues are without substantial controversy. Moreover, upon a motion for summary adjudication, the court shall, by written order or oral order recorded verbatim, specify those issues raised by the motion for summary adjudication as to which there exists a material, triable controversy, and shall specifically refer to the evidence which establishes a triable issue of fact regarding each of those issues. At the trial of the action the issue so specified shall be deemed established and the action shall proceed as to the issues remaining.

(g) Upon the denial of a motion for summary judgment, on the ground that there is a triable issue as to one or more material facts, the court shall, by written or oral order, specify one or more material facts raised by the motion as to which the court has determined there exists a triable controversy. This determination shall specifically refer to the evidence proffered in support of and in opposition to the motion which indicates that a triable controversy exists. The court shall also state its reasons for any other determination. The court shall record its determination by court reporter or written order.

(h) If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just.

(i) If the court determines at any time that any of the affidavits are presented in bad faith or solely for purposes of delay, the court shall order the party presenting the affidavits to pay the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur. Sanctions shall not be imposed pursuant to this subdivision except on notice contained in a party's papers, or on the court's own noticed motion, and after an opportunity to be heard.

(j) Except where a separate judgment may properly be awarded in the action, no final judgment shall be entered on a motion for summary judgment prior to the termination of the action, but the final judgment shall, in addition to any matters determined in the action, award judgment as established by the summary proceeding herein provided for.

(k) In actions which arise out of an injury to the person or to property, when a motion for summary judgment was granted on the basis that the defendant was without fault, no other defendant during trial, over plaintiff's objection, may attempt to attribute fault to or comment on the absence or involvement of the defendant who was granted the motion.

(*l*) A summary judgment entered under this section is an appealable judgment as in other cases. Upon entry of any order pursuant to this section except the entry of summary judgment, a party may, within 20 days after service upon him or her of a written notice of entry of the order, petition an appropriate reviewing court for a peremptory writ. If the notice is served by mail, the initial period within which to file the petition shall be increased by five days if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States. The superior court may, for good cause, and prior to the expiration of the initial period, extend the time for one additional period not to exceed 10 days.

(m) Nothing in this section shall be construed to extend the period for trial provided by Section 1170.5.

(n) The provisions of subdivisions (a) and (b) shall not apply to actions brought pursuant to Chapter 4 (commencing with Section 1159) of Title 3 of Part 3. *(Added by Stats.1973, c. 366, § 2. Amended by Stats.1976, c. 675, § 1; Stats.1978, c. 949, § 2; Stats.1980, c. 57, § 1; Stats.1982, c. 1510, § 1; Stats.1983, c. 490, § 1; Stats. 1984, c. 171, § 1; Stats.1986, c. 540, § 3; Stats.1989, c. 1416, § 16.)*

III. The following are the full texts of the provisons of Title 42 of the United States Code cited in this brief.

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

R.S. § 1977.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96–170, § 1, Dec. 29, 1979, 93 Stat. 1284.

§ 1985. Conspiracy to interfere with civil rights

Preventing officer from performing duties

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to ter, by force, intimidation, or threat, any party or witness in any urt of the United States from attending such court, or from testiing to any matter pending therein, freely, fully, and truthfully, or injure such party or witness in his person or property on account his having so attended or testified, or to influence the verdict, prentment, or indictment of any grand or petit juror in any such court, to injure such juror in his person or property on account of any verct, presentment, or indictment lawfully assented to by him, or of his ing or having been such juror; or if two or more persons conspire the purpose of impeding, hindering, obstructing, or defeating, in y manner, the due course of justice in any State or Territory, with tent to deny to any citizen the equal protection of the laws, or to inre him or his property for lawfully enforcing, or attempting to enrce, the right of any person, or class of persons, to the equal protecn of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or in disguise on the highway or on the premises of another, for the rpose of depriving, either directly or indirectly, any person or ss of persons of the equal protection of the laws, or of equal privies and immunities under the laws; or for the purpose of preventg or hindering the constituted authorities of any State or Territory om giving or securing to all persons within such State or Territory e equal protection of the laws; or if two or more persons conspire prevent by force, intimidation, or threat, any citizen who is lawfully titled to vote, from giving his support or advocacy in a legal manner, ward or in favor of the election of any lawfully qualified person as elector for President or Vice President, or as a Member of Congress the United States; or to injure any citizen in person or property account of such support or advocacy; in any case of conspiracy set rth in this section, if one or more persons engaged therein do, or use to be done, any act in furtherance of the object of such conspiracy, hereby another is injured in his person or property, or deprived or ving and exercising any right or privilege of a citizen of the United tates, the party so injured or deprived may have an action for the revery of damages occasioned by such injury or deprivation, against y one or more of the conspirators.

.S. § 1980.

§ 1986. Action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

R.S. § 1981.

APPENDICE A

First Order Re: Defendants' Motion for Summary Judgment and Alternative Motion for Summary Adjudication

Order Re: Summary Adjudication of Issues

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MAY 29 1989
DONALD M. DICKINSON, Clerk
BY _____ Deputy Clerk

7 1989

IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

DR. LE BUP THI DAO, et al., Plaintiffs, vs. BOARD OF MEDICAL QUALITY ASSURANCE, et al., Defendants.	No. 876321 FIRST ORDER RE: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND ALTERNATIVE MOTION FOR SUMMARY ADJUDICATION

Defendants' motion for summary judgment and alternative motion for summary adjudication of issues came on for hearing on May 8, 1989, and on continued hearing May 11, 1989. Deputy Attorney General Paul Bishop appeared for defendants, James Wheaton and Jerel McCrary appeared for plaintiffs. Having read and considered the papers filed and lodged herein, and considered the arguments and oral and documentary evidence, the following matters are stipulated between all parties, and IT IS ORDERED:

1. The following portions of the First Amended Complaint on file in this action are dismissed:

a. Defendants Board of Medical Quality Assurance, Division of Licensing, Credentials Committee and Department of Consumer Affairs are dismissed from the Fourth Cause of Action, as they are not "persons" under 42 U.S.C. section 1983;

b. Defendants Board of Medical Quality Assurance, Division of Licensing, Credentials Committee and Department of Consumer Affairs are dismissed from the Fifth Cause of Action, as they are not "persons" under 42 U.S.C. section 1985;

c. Defendants Board of Medical Quality Assurance, Division of Licensing, Credentials Committee and Department of Consumer Affairs are dismissed from the Sixth Cause of Action, as they are not "persons" under 42 U.S.C. section 1986;

2. Plaintiffs Drs. Le Bup Dao, Tao Nguyen, Richard Le and Sang Van Tran are no longer seeking declaratory or injunctive relief in this action.

3. Plaintiffs' failure to file any claim with the State bars any monetary relief against any defendant for any cause of action that is based on state law.

4. The Committee for the Professional Rights of Vietnamese Refugee Physicians in the United States is not entitled to any monetary relief for itself or in behalf of any other person. The declaratory and injunctive relief sought by plaintiff Committee for the Professional Rights of Vietnamese Refugee Physicians in the United States is limited to the following, because of the passage of S.B. 1358 in 1987, codified at Business and Professions Code section 2122:

a. compliance by defendants with the Administrative Procedure Act, Government Code section 11340 et seq., in adopting and applying rules of general application regarding applications for licensure from Vietnamese refugees;

b. compliance by defendants with the Bagley-Keene Open Meetings Act, Government Code section 11120 et seq., in their conduct of meeting of the Division of Licensing and its committees during 1986 and 1987, with regard to the licensing of applicants who are refugees from Vietnam;

c. defendants' current and future compliance with the Administrative Procedure Act, Government Code section 11340 et seq., in adopting and applying rules of general application regarding applications for licensure from Vietnamese refugees;

d. defendants' current and future compliance with the Bagley-Keene Open Meetings Act, Government Code section 11120 et seq., in their conduct of meetings of the Division of Licensing and its committees, with regard to the licensing of applicants who are refugees from Vietnam.

In so ruling, the Court expresses no opinion on any challenge or defense to such declaratory and injunctive relief on the grounds of mootness, irrelevancy or other grounds.

3. In all other respects defendants' motion is taken under submission.

Approved as to form.

Weiss Hawk Hanke for Paul V. Bishop
Attorneys for Defendants

Dated: 5/18/89

Judge of the Superior Court

FILED
MAY 19 1989
DONALD W. DICKINSON, Clerk
BY

CALIFORNIA SUPERIOR COURT

CITY AND COUNTY OF SAN FRANCISCO

DEPARTMENT NUMBER EIGHT

DR. LE BUP THI DAO, et al., Plaintiffs, vs. BOARD OF MEDICAL QUALITY ASSURANCE OF THE STATE OF CALIFORNIA, et al., Defendants.	NO. 876 321 ORDER RE SUMMARY ADJUDICATION OF ISSUES

Defendants' Motion for Summary Judgment and for Attorneys' Fees under 42 U.S.C. section 1988, or in the Alternative Summary Adjudication of the Issues, as subsequently limited and restated, is ruled upon as follows.

Insofar as the motion requests an adjudication that the institutional (or "organizational") defendants are entitled to sovereign immunity from suit under 42 U.S.C. section 1981, the motion is DENIED. There admittedly is a split of authority as to whether state agencies are immune from suit under section 1981. Compare, e.g., Yarbrough v. Illinois Dept. of Mental Health (N.D. Ill. 1982), 538 F.Supp. 414, with

Malone v. Schenk (C.D. Ill. 1985), 638 F.Supp. 423. Yarbrough and Skyers v. Port Authority of N.Y. And N.J. (S.D.N.Y. 1976), 431 F.Supp. 79, 83, on which it relied, recognize that whether Congress intended to override state immunity under the Eleventh Amendment (which Congress is authorized to do by both the Thirteenth and Fourteenth Amendments) must be evaluated separately for section 1981, which was adopted as part of the Civil Rights Act 1866 under the authority of the Thirteenth Amendment, and for section 1983, which was adopted as part of the Ku Klux Klan Act of 1871 under the Authority of the Fourteenth Amendment. Both cases concluded that section 1981 was intended to encompass state agencies as "persons" subject to judicial enforcement of its provisions. The court in Malone agreed that the legislative history of section 1981 indicated "that Congress fully intended to reach the governmental acts of the states with the Civil Rights Act of 1866," 638 F.Supp. at 428, but felt that under Atascadero State Hospital v. Scanlon (1985), 473 U.S. 234, state immunity exists unless "the statutue in its language unmistakenly abrogate(s) the state's Eleventh Amendment immunity," ibid., and that the decisions in Yarbrough and Skyers had been "implicitly disapproved by the holding in Atascadero." id. at 429. However, Atascadero held only that section 504 of the Rehabilitation Act of 1973 was not intended to override Eleventh Amendment immunity; it did not purport to modify the basic principle that the meaning of each federal statutue must be determined separately and that properly evidenced Congressional intent may be considered in determining

the meaning of the words of the statute. Since Malone itself recognized the apparent intention of Congress to apply section 1981 to the states, it would seem that Yarbrough and Skyers reached the correct conclusion that the statute overrides the state's immunity. Compare Chavez-Salido v. Cabell (C.D. Calif. 1977), 427 F.Supp. 158, 162-165; Sethy v. Alameda Co. Water Dist. (9th Cir. 1976), 545 F.2d 1157, 1159-1160; Mahone v. Waddle (3rd Cir. 1977), 564 F.2d 1018, 1030-1037. In all events, since the single California appellate decision addressing this issue has stated that state agencies are subject to suit under section 1981, Filipino Accountants' Assn. v. State Board of Accountancy (1984), 155 Cal.App.3d 1023, 1035 n. 12, that is the view which this court should follow.

Whether the evidence is sufficient to support the cause of action under section 1981 against the organizational defendants is not an issue which has been properly presented by the pending motion.

Insofar as the motion requests an adjudication that the individual defendants are entitled to immunity from the various claims that have been asserted against them, the motion will be GRANTED. There is authority that arguably supports the conclusion that the individual defendants are entitled to absolute immunity from liability for their respective roles in refusing to accept for the purpose of licensure the adequacy of the curriculum at the University of Saigon Medical School after 1975, and for delaying the issuance to plaintiffs of licenses to practice medicine in California. See, e.g.,

Horwitz v. Board of Medical Examiners of State of Colorado (10th Cir. 1987), 822 F.2d 1508; Vakas v. Rodriguez (10th Cir. 1984), 728 F.2d 1293; Greene v. Zank (1984), 158 Cal.App.3d 497. However, the uncontroverted facts fail to establish that the functions performed by defendants were sufficiently judicial in nature to warrant quasi-judical absolute immunity. See, e.g., Cleavinger v. Saxner (1985), 474 U.S. 193; Schlegal v. Rebout (9th Cir. 1987), 841 F.2d 937, 941-944. Neither has a basis for quasi-legislative absolute immunity been established.

Nonetheless, the uncontroverted facts do establish the right to qualified immunity. The defendants' actions in insisting upon additional verification of the adequacy of the curriculum at the University of Saigon Medical School, as described in the voluminous declarations and deposition transcripts without material contradiction (as distinguished from the manner in which those actions are characterized in the legal argument of counsel) must "reasonably be thought consistent with the rights" defendants are alleged to have violated. Anderson v. Creighton (1987), ___ U.S. ___, 107A S.Ct. 3034, 3038. The defendants are shielded from liability for damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald (1982), 457 U.S. 800, 818; Little v. City of Seattle (9th Cir. 1988), 863 F.2d 681. There simply is no basis to conclude that the defendants did not believe and could not reasonably have believed they were acting properly in demanding

confirmation of the post-1975 Saigon curriculum as they did.

With respect to the claim that defendants violated plaintiffs' constitutional rights and 42 U.S.C. section 1981 by basing their actions upon impermissible racial or ethnic factors, qualified immunity is not established unless this allegation has been negated. Guitierrez v. Municipal Court of S.E. Judicial Dist. (9th Cir. 1988), 838 F.2d 1031, 1049-1051 vacated as moot, 57 U.S.L.W. 3687 (1989). However, the declarations of the moving parties do negate this allegation, and the opposing evidence cited by the plaintiffs is not sufficient to raise a triable issue of fact concerning this material issue. (See, e.g., Plaintiffs' Response to Defendants' Statement of Undisputed Facts, response to Defendants' Fact #31-32.)

While it may be that the refusal of the defendants to have granted plaintiffs licenses before the recent statutory amendments was unjustifiable, judicial remedies were available to have corrected any possible abuses of discretion. Assuming, arguendo, that there were such abuses and that they affected plaintiffs' constitutional rights, it does not follow that the individual board members and staff bear personal liability. The defendants' evidence does reflect facts establishing the existence of a qualified immunity as a matter of law, and, however sympathetic one may be with the predicament in which the plaintiffs found themselves, plaintiffs' evidence fails to create a triable issue concerning those facts.

Insofar as the defendants' motion requests an adjudication that the Committee for the Professional Rights of

Vietnamese Refugee Physicians in the United States lacks standing to seek declaratory and injunctive relief herein, the motion is DENIED. The moving papers fail to establish that this alleged unincorporated association (First Amended Complaint of Course paragraph 6(b)) lacks standing.

No other issue has been properly presented for summary adjudication.

DATED: May 19, 1989.

STUART R. POLLAK
Judge of the Superior Court

CALIFORNIA SUPERIOR COURT

CITY AND COUNTY OF SAN FRANCISCO

DEPARTMENT NUMBER EIGHT

DR. LE BUP THI DAO, et al.,

Plaintiffs,

vs.

BOARD OF MEDICAL QUALITY ASSURANCE OF THE STATE OF CALIFORNIA, et al.,

Defendants.

NO. 876 321

CERTIFICATE OF SERVICE BY MAIL (CCP 1013a(3))

I, H. WRIN, Deputy County Clerk and Deputy Clerk of the Superior Court of the City and County of San Francisco, certify that I am not a party to the within action; That I served a copy of the attached

ORDER RE SUMMARY ADJUDICATION OF ISSUES

by placing said copy in an envelope addressed to the following:

James R. Wheaton, Esquire
Center for Public Interest Law
1535 Mission Street
San Francisco, CA 94103

Paul V. Bishop
Deputy Attorney General
JOHN K. VAN DE KAMP, Attorney General
of the State of California
1515 K Street, Suite 511
P.O. Box 944255
Sacramento, CA 94244-2550

which envelope was then sealed and postage fully prepaid thereon, and thereafter was on MAY 19 1989, deposited in the United States mail at San Francisco, California.

DATED: MAY 19 1989

H. WRIN

F1255A

APPENDICE B

Court of Appeal Opinion

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

BOARD OF MEDICAL QUALITY ASSURANCE et al.,

Petitioners,

v.

SUPERIOR COURT OF SAN FRANCISCO COUNTY,

Respondent,

LE BUP THI DAO et al.,

Real Parties in Interest.

A046101

(San Francisco Super. Ct. No. 876321)

LE BUP THI DAO et al.,

Petitioners,

v.

SUPERIOR COURT OF SAN FRANCISCO COUNTY,

Respondent,

BOARD OF MEDICAL QUALITY ASSURANCE et al.,

Real Parties in Interest.

A046132

(San Francisco Super. Ct. No. 876321)

A class action challenging alleged discriminatory licensing practices of the Board of Medical Quality Assurance (BMQA) has produced these petitions demonstrating that virtually

everyone involved objects to some aspect of a pair of orders made by respondent court in connection with a motion for summary judgment.[1] For the reasons hereinafter developed, we determine that only one group of parties has some entitlement to relief.

BACKGROUND

The underlying action was initiated by four Vietnamese graduates of the University of Saigon Medical School, joined by the Committee for the Professional Rights of Vietnamese Refugee Physicians in the United States (the Committee).[2] The named defendants were the BMQA, its Division of Licensing and its Credentials Commictee; the Department of Consumer Affairs as "the duly organized and constituted parent agency of BMQA"; and various individuals who occupy official positions with these entities.

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1. In light of the multiplicity of petitioners and real parties in interest, the parties' trial court designations as plaintiffs and defendants will in the interests of simplicity and clarity be employed throughout this opinion.

2. With respect to the Committee the complaint alleges it "is an unincorporated association headquartered in Orange County, California. The Committee has filed for incorporation as a non-profit corporation under the laws of the State of California and the matter is pending. The Committee has a dues paying membership of approximately 100 Vietnamese refugees. Said membership is composed of licensed physicians and applicants for medical licensure throughout the United States. The [C]ommittee's organizational purpose is to ensure that its members are provided full and equal access to professional training, employment and licensure in the medical field."

An additional named plaintiff, Catholic Community Services, was dropped as a party plaintiff prior to the summary judgment motion.

The introductory allegations of the complaint provide an overview: "This action is a class action on behalf of foreign medical school graduates from Vietnam ("FMGs") who have been unlawfully denied a license to practice their profession in California by the discriminatory, illegal, arbitrary and unfounded actions of . . . (BMQA) and certain of its members and employees. . . . [¶] BMQA has been and remains engaged in acts and practices to artificially and invidiously deprive large numbers of FMG applicants of a California medical license without regard to competency standards and for anti-competitive, discriminatory and other improper purposes. These acts, many of which are unlawful in and of themselves, include the conduct of secret meetings with agents of the California[] Medical Association and others, discriminatory use of statutory criteria for licensure, falsifying minutes of meetings and other official documents, fabrication of nonexistent criteria for licensure, failure and refusal to follow statutory mandates, avoidance of required administrative procedures, unfounded charges against applicants and refusal to deal fairly and forthrightly with applicants." More particularly, plaintiffs alleged that (1) "defendants at a closed meeting on January 30-31, 1986 decided to suspend processing of all applications for licensure from persons who graduated from Vietnamese medical schools before or after 1975," and (2) at a meeting conducted on June 25-26, 1987, "defendants announced that no post-1975 Vietnamese graduate would receive a license" until such persons "fulfill[ed] new requirements for licensure," thereby

"violat[ing] both the California Administrative Procedure Act and the California Open Meeting Law."

Based upon these general allegations, and additional allegations detailing the treatment the four individual plaintiffs received from defendants, plaintiffs set forth causes of action seeking (1) damages and injunctive relief for violation of the Fourteenth Amendment's guarantees of equal protection and due process (2) damages for violation of 42 U.S.C. section 1981 (3) damages for violation of 42 U.S.C. section 1983 (4) damages for violation of 42 U.S.C. section 1985 (5) damages for violation of 42 U.S.C. section 1986 (6) damages for violation of the Administrative Procedure Act (Gov. Code, § 11340 et seq.) and (7) declaratory and injunctive relief for violation of the Open Government Act (Gov. Code, § 11120 et seq.). The substantive portion of the complaint concluded with an omnibus cause of action for declaratory and injunctive relief based upon all matters "hereinbefore alleged."[3]

In due course defendants moved for summary judgment or summary adjudication of issues. The grounds for the motion relevant to these proceedings were that (1) "Plaintiff Committee has no standing to assert the constitutional rights of the individual plaintiffs" (2) "Certain issues and claims in this

---

3. Additional causes of action seeking damages for violation of the Unruh Civil Rights Act (Civ. Code, § 51) and the Cartwright Act (Bus. & Prof. Code, § 16720 et seq.) were subsequently dismissed by plaintiffs.

matter are now moot" and (3) "By reason of immunity, defendants are not liable for suit for violation of 42 U.S.C. sections 1981, 1983, 1985 or 1986." As part of their motion defendants also sought an award of costs, including attorneys fees, pursuant to 42 U.S.C. section 1988.

After receiving voluminous papers, prodding the parties into narrowing the areas of dispute by stipulation, and conducting two hearings on the motion, respondent court made two orders (both filed on May 19, 1989) in which it ruled that (1) pursuant to stipulation plaintiffs' claims based upon 42 U.S.C. section 1983, 1985, and 1986, were dismissed as against the institutional defendants (2) by reason of a split of authority the institutional defendants were not entitled to summary judgment on the claim based upon 42 U.S.C. section 1981 (3) the individual defendants were clothed with "qualified immunity" against all of plaintiffs' claims (4) the Committee had standing but only to pursue claims for declaratory and injunctive relief, not damages, by reason of the enactment of Business and Professions Code section 2122, and (5) "[n]o other issue has been properly presented for summary adjudication."

Unhappy with these determinations, plaintiffs and defendants each filed a petition for extraordinary mandamus relief. Alternative writs were issued.

REVIEW

Our usual practice in dealing with situations where both

sides are unhappy with trial court rulings, orders, or judgments is to deal with the points raised by one side before progressing to the points urged by the other side. With these petitions, however, we have determined that the most logical analytical progression requires some interlineation of the contentions advanced by the parties.

I

We first turn to defendants' petition (AO46101). Respondent court ruled, and plaintiffs do not dispute, that the state agencies named in the complaint have immunity from suit for purposes of 42 U.S.C. sections 1983, 1985, and 1986. The ruling that comparable immunity did not extend to section 1981 was correct. (See Filipino Accountants' Assn. v. State Bd. of Accountancy (1984) 155 Cal.App.3d 1023, 1035, fn. 12.) Defendants' elaborate arguments to the contrary are not persuasive because they are founded on considerations derived from application of the Eleventh Amendment to actions commenced in federal court. But the Eleventh Amendment does not apply to actions brought in state courts. (See Will v. Michigan Dept. of State Police (1989) ___ U.S. ___ (109 S.Ct. 2304, 2307).)

Yet although defendants may have lost this battle, plaintiffs cannot win the war. Plaintiffs invoked section 1981 solely in connection with one of their claims for damages alleged in their complaint. Less than a year ago the United States

Supreme Court held that "the express cause of action for damages created by § 1983 constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981 by state governmental units." (Jett v. Dallas Independent School Dist. (1989) ___ U.S. ___ (109 S.Ct. 2702, 2721-2722).)[4] A further difficulty is that section 1983 does not apply to claims against a State. (Will v. Michigan Dept. of State Police, supra, at pp. ___ [109 S.Ct. 2304 at pp. 2307-2308, 2312]; see Pyne v. Meese (1985) 172 Cal.App.3d 292, 401-403.) What defendants choose to do with these recent holdings--which were issued after respondent court made its ruling--is up to them. All we can say at present is that no error occurred when the immunity claim by the institutional defendants was rejected.

II

In their petition (AO46132) plaintiffs ask us to overturn the determination by respondent court that the individual defendants enjoy immunity from plaintiffs' damage claims. To continue the theme developed in part I, that determination has

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4. Plaintiffs are correct in noting that the lead opinion in Jett was only a plurality opinion signed by four Justices. But while that opinion may fall short of an iron-clad holding, Justice Scalia (who filed a separate opinion "concurring in part and concurring in the judgment") disagreed with the plurality only on a point of methodology. As a matter of practical reality, the Jett plurality opinion represents the majority viewpoint of the Court. In any event, and however imperfectly expressed, we think that the Jett plurality trumps all of the lower court authorities to the contrary relied upon by plaintiffs.

been vindicated by recent related developments from the United States Supreme Court.

Insofar as respondent court's determination found against plaintiffs on their claim based upon 42 U.S.C section 1983, that ruling is invulnerable for a reason which could not be anticipated by either the court or the parties. In Will v. Michigan Dept. of State Police, supra, ___ U.S. ___ (109 S.Ct. 2304 at pp. 2311-2312), the Supreme Court held that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983" and therefore cannot face liability for damages. Lesser federal courts have reached the same conclusion with respect to sections 1985 and 1986. (See Coffin v. South Carolina Dept. of Social Services (D.S.C. 1983) 562 F.Supp. 579, 585-586 and authorities cited.)

Defendants submitted considerable, uncontradicted evidence in support of their claim that an undisputed material fact was that the "Individual defendants . . . were at all times material to this matter state officials acting in their official capacities under color of State Law." Those defendants can therefore face no liability for monetary damages as to sections 1983, 1985, and 1986.

There remains only plaintiff's cause of action based on section 1981. We believe this particular aspect of the controversy has become moot. If it is assumed that respondent court's ruling was erroneous because it took insufficient account of the factor of the individual defendants' unlawful motive for

their actions (see Gutierrez v. Mun. Ct. of S.E. Judicial Dist. (9th Cir. 1988) 838 F.2d 1031, 1049-1051), plaintiffs will be unable to recover the damages they seek. As previously established, damages for a violation of section 1981 can be had only pursuant to section 1983 (Jett v. Dallas Independent School Dist., supra, ___ U.S. ___ (109 S.Ct. 2702 at pp. 2721-2722), but the individual defendants have immunity against the section 1983 claims because they were acting solely in their official capacities. (Will v. Michigan Dept. of State Police, supra, ___ U.S. ___ [109 S.Ct. 2304 at pp. 2311-2312].) In these circumstances mootness is established because no effectual relief could be granted. (See 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 517, p. 499.)

III

The preceding discussion has resolved the issues of plaintiffs' damage claims, and has answered the sole contention of error pressed by plaintiffs. We next address arguments by defendants regarding whether plaintiffs' claims for declaratory and injunctive relief are moot.

Pursuant to a stipulation between the parties, one of the orders filed by respondent court specified that the individual plaintiffs "are no longer seeking declaratory or injunctive relief."[5] Plaintiffs do not dispute this ruling. There

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5. The parties stipulated, and respondent court ordered, that the Committee "is not entitled to any monetary relief for itself or in [sic: on] behalf of any other person."

consequently seems no point to considering mootness as to those plaintiffs.

Respondent court rejected defendants' claim that the Committee had no standing to seek any kind of relief, but the court's orders restricted the Committee's standing to certain specific aspects of the declaratory and injunctive relief claims regarding the alleged violations of the Administrative Procedure and Open Meeting Acts. Defendants assert that the Committee lacks standing, thus mooting all claims for declaratory and injunctive relief. It has been the practice of this court to decide questions of organizational standing only with the benefit of a full record that provides some concrete basis for evaluating inanimate entities. (See McKeon v. Hastings College (1986) 185 Cal.App.3d 877, 892-893; cf. Environmental Law Fund, Inc. v. Town of Corte Madera (1975) 49 Cal.App.3d 105.) The soundness of this approach, which implicitly treats the issue as one of fact, appears pertinent here, given that (insofar as can be determined from the limited record presented to us) defendants submitted nothing in the way of supporting evidence required by Code of Civil Procedure section 437c, subdivision (b). As respondent court put it: "The moving papers fail to establish that this alleged unincorporated association . . . lacks standing." Accordingly, we do not believe there is an adequate basis for our deciding as a matter of law that respondent court erred in not terminating the equitable relief aspects of this litigation.

Defendants present a contention which, on paper,

constitute a persuasive argument that the remaining issues of equitable relief have been rendered moot by the enactment of Business and Professions Code section 2122.[6] Respondent court did not address this issue. Its reasons for doing so are unclear. In the first of the May 19th orders the court took pains to make clear that it was expressing "no opinion on any challenge or defense to such declaratory and injunctive relief on the grounds of mootness, irrelevancy or other grounds." In the second of the orders the court stated: "No other issue has been properly presented for summary judgment."

The summary judgment statute seems quite clear about the granting or denial of a motion for summary judgment. The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) The grounds for denying the motion are

---

6. The effect of this statute, which figured prominently in the parties' stipulation which underlay one of the May 19th orders, deserves some explanation.

One of the major points of plaintiffs' complaint was that defendants had refused to follow usual practice by appointing a Faculty Committee in Exile, composed of former faculty members of the University of Saigon Medical School, which would evaluate and make recommendations concerning licensing of persons claiming to be graduates of that school. Section 2122 mandated the creation of such a committee for this purpose and directs that the BMQA licensing division "shall accept the recommendation of the committee, unless the division finds, after notice and opportunity for hearing, that the committee's recommendation is not based upon substantial evidence." (Bus. & Prof. Code, § 2122, subd. (c).) The committee's members were to have been appointed by February 1, 1988. (Id., subd. (a).) Section 2122 contains an automatic repeal provision for January 1, 1992. (Id., subd. (d).)

clear: (1) the existence of "a triable issue as to one or more material facts" (id., subd. (g)); (2) the moving party's failure to comply with the requirement of "a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed . . . [with] reference to the supporting evidence" (id., subd. (b)); (3) "in the discretion of the court, where the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to that fact; or where a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof" (id., subd. (e)); or (4) "[i]f it appears from the affidavits submitted in opposition . . . that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented" (id., subd. (h)).

Following the lead of Division Two, this court has held that "[a] trial court may not refuse to hear a summary judgment motion filed within the time limits of section 437c." (Sentry Ins. Co. v. Superior Court (1989) 207 Cal.App.3d 526, 529; see Wells Fargo Bank v. Superior Court (1988) 206 Cal.App.3d 918.) A logical corollary of this principle is that a trial court must rule on all aspects of a motion for summary judgment or summary adjudication unless there is ground specified in section 437c for withholding a decision. A trial court is not allowed the luxury of not deciding or of not expressing its opinion, as did respondent court, concerning a matter brought forward in

conformity with statutory procedures. It appears from a fair reading of section 437c that a trial court is not permitted to retreat into enigmatic silence or opaque remarks. According to subdivision (g): "Upon the denial of a motion for summary judgment, on the ground that there is a triable issue as to one or more material facts, the court shall, by written or oral order, specify one or more material facts raised by the motion as to which the court has determined there exists a triable controversy. This determination shall specifically refer to the evidence proffered in support of and in opposition to the motion which indicates that a triable controversy exists. The court shall also state its reasons for any other determination. The court shall record its determination by court reporter or written order." (Emphasis added.)

Respondent court may well have had a valid reason for denying defendants' motion as to this point. Unfortunately, if such a reason exists it is not discernible from the record before us. As the cause will have to be returned to respondent court for entry of a new order, the situation may be clarified at that time.

IV

Defendants' final contention is that respondent court "abused its discretion in refusing to rule" on their application for attorneys' fees pursuant to 42 U.S.C. section 1988. The preceding discussion concerning the flaw in the ruling on

defendants' arguments relative to plaintiffs' equitable relief claims is equally applicable to this contention.

In A046101 a peremptory writ of mandate will issue directing respondent court to vacate its orders of May 19, 1988, and enter a new order in conformity with this opinion.

In A046132 the petition for a peremptory writ is denied and the alternative writ is discharged.

Poché, Acting P.J.

WE CONCUR:

Channell, J.

Perley, J.

Bd. of Medical Quality Assurance
v. Superior Court
A046101

Le Bup Thi Dao v. Superior Court
A046132

APPENDICE C

Plaintiffs' Response to Defendants' Statement of Undisputed Facts: Defendants' Fact No. 24

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

DR. LE BUP THI DAO, et al., Plaintiffs, v. BOARD OF MEDICAL QUALITY ASSURANCE OF THE STATE OF CALIFORNIA, et al., Defendants.	No. 876 321 PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED FACTS Trial: June 5, 1989

BEST AVAILABLE COPY

DEFENDANTS' FACT #24

Individual defendants Kenneth Wagstaff, Dr. Galal S. Gough, Dr. Lindy Kumagai, Dr. John Lungren, Dr. James Magnall, Raymond Mallel, Audrey Melikiin [sic], Dr. J. Alfred Rider and Dr. Jerome Unatin were at all times material to this matter state officials acting in their official capacities under color of State Law.

PLAINTIFFS' COUNTERFACTS AND EVIDENCE

UNDISPUTED AND IRRELEVANT.

See Memorandum of Points and Authorities served and filed herewith on the legal impact of "acting...under the color of State Law."